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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

LAFAYETTE PLACE ASSOCIATES,

Petitioner,

vs.

CITY OF BOSTON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT
OF MASSACHUSETTS

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court should deny the petition for a writ of certiorari where Petitioner Lafayette Place Associates ("Petitioner" or "LPA") did not raise its purported Constitutional law claims before the Supreme Judicial Court of the Commonwealth of Massachusetts and there is no evidence that the Supreme Judicial Court considered or ruled upon the different Constitutional law claim that was presented to it by the Petitioner?

2. Whether this Court should deny the petition for a writ of certiorari where the decision of the Supreme Judicial Court relied entirely upon and was consistent with state common law precedent and does not implicate constitutional concerns?

LIST OF PARTIES

Petitioner Lafayette Place Associates is a Massachusetts limited partnership. Respondent City of Boston is a municipality.

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OPINIONS BELOW

Respondent concurs in the statement of the opinions below recited in the petition.

STATEMENT OF JURISDICTION

As explained more fully below, the Supreme Court lacks jurisdiction to hear this action under 28 U.S.C. § 1257 because the judgment of the Supreme Judicial Court rests entirely upon state law grounds and the federal law issues raised by Petitioner here were not presented to or decided by the court below.

CONSTITUTIONAL PROVISIONS INVOLVED

None. The relevant portions of the judgment of the Supreme Judicial Court implicate only the common law of Massachusetts governing contracts.

STATEMENT OF THE CASE

This case does not merit certiorari review in this Court. The position urged by Petitioner here, i.e., that the Supreme Judicial Court violated constitutional protections by altering settled common law rules, was *never* raised or framed before the Supreme Judicial Court and the Supreme Judicial Court thus never considered or passed upon this issue. The decision of the Supreme Judicial Court, in any event, rests solidly upon bedrock common law principles governing contracts. No federal questions are implicated by the court's judgment. Even if the Supreme Court were to consider imposing constitutional limitations on state common law judgments, which it has consistently refused to do, *Lafayette Place Assoc. v. Boston Redevelopment Authority* is not the appropriate test case.

A. Procedural History

On March 16, 1992, Petitioner filed a complaint in the trial court of Massachusetts against the City of Boston ("City" or

"Respondent") and the Boston Redevelopment Authority ("BRA") seeking, among other things, damages in connection with a contract known as the "Tripartite Agreement." The Tripartite Agreement was executed by the City, Petitioner, and the BRA in 1978 and governed the Lafayette Place commercial development project in the midtown area of Boston.

On October 21, 1994, a jury awarded Petitioner $9,600,000 against the City for breach of contract.

On September 16, 1997, the City filed a notice of appeal.[1] On May 20, 1998, the Supreme Judicial Court of the Commonwealth of Massachusetts ("Supreme Judicial Court"), in a unanimous decision, reversed entry of judgment against the City. In an opinion written by Justice Charles Fried, the Supreme Judicial Court rested its judgment upon a thorough analysis of the terms of the Tripartite Agreement and long-standing principles of Massachusetts common law governing contracts.

Petitioner filed a petition for rehearing with the Supreme Judicial Court on June 10, 1998. In one paragraph of the twenty-one page petition for rehearing Petitioner argued for the first time that judgment in favor of the City violated Petitioner's right to due process. Petitioner did not cite to the Takings Clause of the Fifth Amendment to the U.S. Constitution or claim, as it does here, that the Supreme Judicial Court had "sharply" broken with state common law.

The Supreme Judicial Court did not request a response to the petition by the City and, under Massachusetts Rule of Appellate Procedure 27(a),[2] the City was not permitted to respond in the absence of a request. On July 1, 1998, without written opinion,

1. Due to a procedural matter, the time for appeal did not start running until August 20, 1997.

2. Massachusetts Rule of Appellate Procedure 27(a) provides in pertinent part: "No answer to a petition for rehearing will be received unless requested by the quorum or panel. . . ."

the Supreme Judicial Court denied Petitioner's request for rehearing.

Petitioner filed its petition for writ of certiorari to the Supreme Judicial Court of Massachusetts on November 25, 1998.

B. Factual History

1. *The Tripartite Agreement*

In the late 1970s and early 1980s, Petitioner was the developer of an urban renewal project (known as Lafayette Place) in downtown Boston undertaken pursuant to the state's urban renewal laws. On or about December 22, 1978, Petitioner, the City, and the BRA entered into the Tripartite Agreement, which set forth the basic terms covering the development of the Lafayette Place project.

In the early 1980s, in what is referred to as "Phase I" of the Lafayette Place development, Petitioner developed a garage, a shopping mall, and a hotel. Under "Phase II" of the project, Petitioner generally planned — subject to BRA approval — to build retail space for a large department store and an office tower on an area of land referred to as the "Hayward Parcel," adjacent to the existing mall. The Tripartite Agreement included a clause, Section 6.02, that provided for the possible acquisition by Petitioner of the Hayward Parcel.

Before the City could convey any rights to Petitioner, among other things, the boundaries of the land and air rights that were to be appraised and conveyed had to be defined; the City was to have appraisals performed of certain segments of the Hayward Parcel (parcels "D-3" and "D-4") to determine their value as of 1978; the price for the Hayward Parcel had to be determined pursuant to a formula that contained variables that were not fixed; there was no date set for the transfer; and, there was no agreement on how payment would be made. According to the Tripartite Agreement, the foregoing details were to be determined and set

out in a purchase and sale agreement to be negotiated in the future by the parties. If there were disagreements on the details of the transfer, the parties were to submit their dispute to arbitration.

2. *The BRA's Design Review Process*

The Phase II project, which was in a "very sensitive" city district,[3] was subject to the BRA's intensive design review process. Beginning in approximately 1984, a period of discussions and negotiations ensued between representatives of Petitioner and the BRA regarding what Petitioner could build on the Hayward Parcel. Petitioner's representatives and BRA staff assigned to the Lafayette Place project held numerous meetings from 1985 through mid-1987. By the fall of 1987, Petitioner had not completed any of the four stages of the BRA's design review process for Phase II and, at that point, Petitioner stopped meeting with the BRA.

3. *The January 1, 1989 "Drop Dead" Date*

Following discussions, on October 29, 1987, the City, the BRA, and Petitioner executed an amendment to the Tripartite Agreement known as the Third Supplemental Agreement and Amendment to the Tripartite Agreement (the "Third Amendment"). It was drafted by Petitioner's attorneys and provided in relevant part:

> unless the City and the Developer shall agree to a further extension, the Developer shall lose its rights hereunder to proceed with an acquisition [of the Hayward Parcel] if a closing has not occurred by January 1, 1989, unless the City and/or the Authority shall fail to work in good faith with the Developer through the design review process to conclude a closing.

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3. The Midtown district of Boston contains numerous historic buildings, as well as pedestrian shopping malls, and adverse impacts in that area could threaten the Boston Common environment.

4. *The Campeau Lease*

In March, 1988, Petitioner entered into an arrangement with a large commercial developer ("Campeau") described as a "lease." As part of the deal, Campeau had the option to purchase all right, title and interest of Petitioner in Lafayette Place, which had already been constructed, and any rights Petitioner had under the Tripartite Agreement including whatever rights were provided by Section 6.02, as amended, with respect to the Hayward Parcel.

On March 15, 1988, Petitioner and Campeau executed the "lease." Pursuant to its terms, Campeau took over possession and control of Lafayette Place and assumed the "complete authority, control and responsibility to pursue the development" of the Hayward Parcel. Significantly, in connection with the so-called "lease," Campeau paid Petitioner at least $17,600,000 cash in exchange for all of Petitioner's rights in connection with Lafayette Place and the Tripartite Agreement, *including whatever rights Petitioner had under Section 6.02*. The lease states that Campeau would pay Petitioner an additional $2,000,000 dollars upon transfer of title of the Hayward Parcel from the City to Campeau.

From March 1988 forward, all negotiations and discussions concerning the exercise of the option for the possible sale of the Hayward Parcel as set forth in the Third Amendment were conducted between the City, the BRA and Campeau. Petitioner ceased to be involved with the development project and thereafter did not attempt to have the BRA perform a design review of any design Petitioner had been proposing for the development of Phase II. Prior to transferring its rights in Lafayette Place to Campeau, Petitioner never requested conveyance of the Hayward Parcel; never demanded a deed for the Hayward Parcel from the City; never presented a purchase and sale agreement to the City; never presented appraisals to the City that it contended the City should have done; and made no claim of arbitration under the Tripartite Agreement for delivery of the land.

5. The Expiration of Petitioner's Rights Under The Tripartite Agreement

Beginning in the spring of 1988, Campeau negotiated with the BRA over, among other things, a much larger proposed development of the Hayward Parcel. On December 19, 1988, two weeks before Petitioner's option rights in the Hayward Parcel were to expire, Campeau sent a letter to Boston Mayor Raymond Flynn indicating that Campeau was prepared to make immediate payment for the Hayward Parcel (even though, among other open issues, no price had been calculated or agreed upon).

The "Campeau letter" did not specify when, where, or how Campeau would tender payment. It did not specify a price for the purchase of the Hayward Parcel; it did not suggest a time and place for the parties to meet to resolve their differences; and it did not indicate what Campeau believed the City's obligations were at the time. The statement that Campeau wished to make immediate payment was, as the Supreme Judicial Court noted, contained in a single sentence "embedded in a long letter to the mayor sent only weeks prior to the termination of the option period." 427 Mass. at 521; Appendix to Petition for a Writ ("Appendix") at 40. Campeau sent the letter to Mayor Flynn even though it knew that the BRA, not the mayor's office, had primary responsibility for the Hayward Place transaction.

On December 30, 1988, the director of the BRA wrote to Campeau stating

> [b]y their own terms, prior agreements on Hayward Place will expire on January 1, 1989. This event does not in our judgment alter our willingness to work with you and your representatives to develop the Boston Crossing Project. It simply puts the question of the disposition of Hayward Place in a current context.

On December 30, 1988, a representative of Campeau responded to Mr. Coyle's letter of the same date and stated that it was a "meaningful step forward in making this project a reality."

Accordingly, no closing on the Hayward Parcel took place by January 1, 1989, at which time Petitioner's rights expired under the express terms of the Third Amendment. Nonetheless, during the spring of 1989, Campeau worked with the BRA to obtain design review approval on the development of the Hayward Parcel. In June 1989, the BRA approved the "Boston Crossing" project. Campeau never undertook the development of Hayward Place because, in 1990, it declared bankruptcy.

REASONS FOR DENYING THE WRIT

The Petition for Writ of Certiorari should be denied because the Supreme Court lacks jurisdiction. The Court lacks jurisdiction because the case presents no important federal questions; the Court lacks jurisdiction because the decision of the Supreme Judicial Court of Massachusetts rested entirely on state law grounds; and the Court lacks jurisdiction because the purported "federal question" sought to be raised by the Petitioner here was never raised in the Supreme Judicial Court. In addition, the Petition should be denied because the case was decided correctly by the Supreme Judicial Court and because the decision turns on its own facts and will affect few, if any, parties other than the litigants themselves.

The Supreme Judicial Court's judgment rests *entirely* on the application of long-standing Massachusetts contract principles to the terms of the contract at issue in this case. Far from representing a "sharp break" with existing common law, the decision of the Supreme Judicial Court is fully consistent with and rests upon existing common law precedent in Massachusetts. It is well settled that the Constitution of the United States has "no voice" with respect to state civil judgments that rely entirely on state common law grounds. This case does not merit consideration under Rule 10.1, and the Petition should be denied.

An independent reason for denying the Petition is that Petitioner never presented to the Supreme Judicial Court the question that it now seeks to raise here as a purported constitutional issue. Petitioner's failure to raise this issue in the Supreme Judicial Court, although it had the opportunity to do so, should bar review in this Court.

The case was decided correctly by the Supreme Judicial Court. The Supreme Judicial Court carefully reviewed the Tripartite Agreement and the facts on record. It found that the Petitioner had not followed through on a number of the procedures necessary to make the contract complete and integrated, and that therefore Petitioner could not be heard to claim that the City was in breach. The fact that the Petitioner had not followed through on those procedures is not disputed by Petitioner, and the legal conclusion that, as a result, there could be no breach is the only correct one under Massachusetts law. For this reason, too, the Petition should be denied.

I. PETITIONER FAILED TO PROPERLY RAISE, PRESENT, AND PURSUE A SUBSTANTIAL FEDERAL QUESTION BEFORE THE SUPREME JUDICIAL COURT.

Petitioner never raised before the Supreme Judicial Court the question that it now characterizes as a substantial federal question for purposes of this Petition. In the course of briefing this case on appeal in the Supreme Judicial Court, none of the parties, including Petitioner, ever raised, suggested or even hinted at any federal questions, because there were none. At the last moment, in its petition for rehearing in the Supreme Judicial Court, Petitioner made passing allusion to a claim that the "arbitrary and capricious conduct" of the Supreme Judicial Court constituted a violation of Petitioner's "Fourteenth Amendment right to due process." This was not at all the same issue that Petitioner seeks to present to this Court in its petition for a writ; in fact, the question raised in the petition for rehearing in the Supreme Judicial Court is inconsistent

with the question raised by Petitioner here. In any event, Petitioner's effort to raise the issue in the Supreme Judicial Court was untimely. Because Petitioner failed to bring its federal claims and the grounds therefor to the attention of the Supreme Judicial Court with "fair precision and in due time," *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928), the Supreme Court is without jurisdiction to hear Petitioner's claim.

It is essential to the jurisdiction of the Supreme Court under 28 U.S.C. § 1257 that a substantial federal question has been properly raised, presented, and pursued in the state court proceedings.[4] 28 U.S.C. § 1257(a). As this Court has explained, " 'it would be unseemly in our dual system of government' to disturb the finality of state judgments on a federal ground that the state court did not have occasion to consider." *Adams v. Robertson*, 117 S. Ct. 1028, 1031 (1992) (quoting *Webb v. Webb*, 451 U.S. 493, 500). In the absence of proper presentation of federal questions before the state court, the court does not have an opportunity to decide the issue in the first instance and perhaps to reshape or avoid the issue. 117 S. Ct. at 1031.[5]

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4. With "very rare exceptions," we have adhered to the rule in reviewing state court judgments under 28 U.S.C. § 1257 that we will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review.

Adams v. Roberson, 117 S. Ct. 1028, 1029 (1997) (per curiam) (quoting *Yee v. Escondido*, 503 U.S. 519, 533 (1992)) (citations omitted).

5. "[P]ractical considerations" further limit this Court's capacity to decide issues not raised below. *Id.* (citing *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 79 (1988)). Proper presentation of federal questions in the state court

> not only avoids unnecessary adjudication in this Court, by allowing state courts to resolve issues on state law grounds,

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Petitioner comes before this Court to urge that the Court consider Petitioner's claim that the Takings and/or Due Process clauses of the U.S. Constitution were violated by the Supreme Judicial Court because that court "sharply alter[ed] settled common law" and "appl[ied] its new rule retroactively." Petition at i. Petitioner also frames the question presented as follows: "[d]oes the retroactive application of a sharp change in common law operate as a taking in this case?" Petition at 11.

Petitioner never posed these questions or framed these issues in its submissions to the Supreme Judicial Court. As noted, in the briefs filed below on appeal, there was absolutely no mention or suggestion of a federal question of any kind. And in its petition for rehearing before the Supreme Judicial Court, the entirety of Petitioner's identification of and discussion concerning a purported federal question was one paragraph in a 21-page letter brief, as follows, with the heading "The Court's Decision Violates The Due Process Clause of the Fourteenth Amendment Of The United States Constitution:"

> In reaching its result, the Court overlooked settled law concerning the appropriate standard of review to be applied upon review of a denial of judgment notwithstanding a jury verdict. More specifically, the Court conducted its own review of the evidence, drew inferences against, rather than in favor of LPA, discounted or disregarded entirely certain evidence favorable to LPA, and then applied the law to the facts it had improperly determined. In so doing, the Court utterly failed to give deference to the jury's verdict that is required under the long standing law

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> but also assists us in our deliberations by promoting the creation of an adequate factual and legal record.

117 S. Ct. at 1031. The parties, in addition, would have "the opportunity to test and refine their positions before reaching this Court." *Id.*

> of the Commonwealth and the United States and therefore effectively deprived LPA of its right to a jury trial. Indeed, the Court, by virtue of its decision, took LPA's property interest in the Hayward Parcel as set forth in Section 6.02 of the Tripartite Agreement, and gave it to the City of Boston. Such arbitrary and capricious conduct constitutes a violation of LPA's Fourteenth Amendment right to due process.

Petition for rehearing at 7; Appendix at 13-14.

Petitioner did not tell the Supreme Judicial Court that, in Petitioner's view, the decision below constituted a "sharp break" with settled common law or that it created a new rule of law. Nor did Petitioner complain of "retroactive application." What Petitioner complained about, and identified for the Supreme Judicial Court as the "constitutional" or federal question, was the "standard of review" applied by the Supreme Judicial Court, and its purported failure to "give the deference to the jury's verdict that is required under the long-standing law of the Commonwealth and the United States." As a result, the Supreme Judicial Court never had the opportunity to consider, let alone address, the "federal question" that Petitioner brings to this Court.

"A generic reference to the Fourteenth Amendment is not sufficient to preserve a constitutional claim based on an unidentified provision of the Bill of Rights. . . ." *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 77 (1988) (quoting *Taylor v. Illinois*, 484 U.S. 400, 407, n.9 (1988)). As this Court stated in *Webb v. Webb*, 451 U.S. 493, 501 (1981),

> [a]t the minimum . . . there should be no doubt from the record that a claim under a federal statute or the Federal constitution was presented in the state courts *and that those courts were apprised of the nature or substance of the federal claim* at the time and in the manner required by the state law.

(Emphasis added.) The Supreme Judicial Court was never "apprised of the nature or substance" of the claims presented here by Petitioner. *See Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 550 (1987).

Not only is the federal question raised by Petitioner in this Court different than the general issue raised in the petition for rehearing, but the two are inconsistent. In essence, in its petition for rehearing, Petitioner asserted that, by weighing the facts itself, drawing inferences against Petitioner, and "appl[ying] the law to the facts it had improperly determined," the Supreme Judicial Court failed to give the deference to the jury's verdict required by the U.S. Constitution. In other words, Petitioner asserted below that the Supreme Judicial Court applied existing law to a mistaken factual premise. This claim is inconsistent with the theory now presented by Petitioner to this Court. Here, Petitioner claims that the Supreme Judicial Court applied *new* law to a factual record, which Petitioner now decides not to challenge.

Even if the federal issues raised here and in the proceedings below were the same, "[i]t has been the traditional practice of this Court . . . to decline to review claims raised for the first time on rehearing in the court below." *Wills v. Texas*, 511 U.S. 1097, 1097 (1994) (O'Connor, J., concurring in denial of certiorari). *See also Rotary Club of Duarte*, 481 U.S. at 549-550; *Hanson v. Denckla*, 357 U.S. 235, 244, n.4 (1958); *see also Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 128 (1945) ("Questions first presented to the highest State court on a petition for rehearing come too late for consideration here, *unless* the State court exerted its jurisdiction [over them on rehearing]") (emphasis added). As the Court stated in *Tidal Oil Co. v. Flanagan*, 263 U.S. 444, 455 (1924):

> This court has always held it a prerequisite to the consideration here of a federal question in a case coming from a state court that the question should have been raised in that court before decision, or that it should have been actually entertained and

> considered upon petition to rehear. A mere denial of the petition by the state court without opinion is not enough.

See also Bankers Life and Casualty Co. v. Crenshaw, 486 U.S. 71, 77-78 (1988) ("A party may not preserve a constitutional challenge by generally invoking the Constitution in state court [in a petition for rehearing] and awaiting review in this Court to specify the constitutional provision it is relying upon.").[6]

Here, the Supreme Judicial Court denied the petition for rehearing without written opinion and without requesting a response from the City. We do not know whether the Supreme Judicial Court considered Petitioner's federal constitutional law

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6. Petitioner apparently justifies its approach by asserting that there was no federal claim to be raised until the Supreme Judicial Court made a purported "sharp break" with state common law. A federal question may be noted for the first time in a petition for rehearing in a state supreme court if the federal question is triggered by an unanticipated decision of the court. *Herndon v. Georgia*, 295 U.S. 441, 443-444 (1935) (holding that assertion of federal claim in petition for rehearing was not timely where state supreme court's decision could have been anticipated by reading of prior decisions). Even then, the question must be squarely presented to the Court. Here, the plain gist of Petitioner's arguments is that any reversal of the judgment in Petitioner's favor amounts to a federal taking or violation of Petitioner's Due Process rights. Thus, Petitioner's constitutional concerns could have been raised before the Supreme Judicial Court issued judgment. Moreover, as explained below, the Supreme Judicial Court's decision does not represent a "sharp break" with common law. As in *Herndon*, the Supreme Judicial Court's decision should have been anticipated based on existing common law precedent in Massachusetts and the City's consistent arguments to the courts, in effect, that the City could not have been in breach of the Tripartite Agreement because Petitioner itself was not prepared to perform. *See* 427 Mass. at 520 n.11; Appendix at 38, n.20. Last, even if Petitioner was justified in not raising a constitutional argument until it filed the petition for rehearing, it failed to squarely present its claim before the state court. *See* discussion *supra*.

claim.[7] In the absence of the state court's consideration and determination of a federal law issue, the Supreme Court — as a prudential matter — should decline to review the state court decision.

II. THE SUPREME COURT DOES NOT HAVE JURISDICTION TO REVIEW THE JUDGMENT OF THE SUPREME JUDICIAL COURT, WHICH RESTS ENTIRELY UPON STATE COMMON LAW; THE JUDGMENT IS NOT SUBJECT TO CONSTITUTIONAL LIMITATIONS.

It is fundamental that this Court lacks jurisdiction to review matters of state law. The judgment rendered by the Supreme Judicial Court in this action — a garden variety state court judgment based on common law governing contracts — rests *entirely* upon state law grounds. This Court has held repeatedly that a civil judgment of a state court based on common law is not by itself subject to the federal Constitution, even where the judgment unexpectedly overturns state law precedent or judicially impairs rights under contract. Even if the Court were to give credence to Petitioner's oft-rejected argument that "startling" state court judgments should be subject to Constitutional limitations, nothing in Justice Fried's opinion for the unanimous court represents a departure from or break with existing common law in Massachusetts. Thus, there is no foundational premise for

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7. When the highest state court is silent on a federal question before us, we assume that the issue was not properly presented, *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 550 (1987), and the aggrieved party bears the burden of defeating this assumption, *ibid.*, by demonstrating that the state court had "a fair opportunity to address the federal question that is sought to be presented here," *Webb v. Webb*, 451 U.S. 493, 501. . . .

Adams v. Robertson, 117 S. Ct. at 1029.

Petitioner's constitutional law arguments and there is no basis for Supreme Court jurisdiction over the very local matters raised in this litigation.

In *Herb v. Pitcairn*, the Supreme Court explained that its inability to review state court judgments that rely on state law grounds:

> is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights.

324 U.S. 117, 125-126 (1945). "[S]ince the state law determination is sufficient to sustain the decree, any opinion of this Court on the federal question would be purely advisory." *Lambrix v. Singletary*, 117 S. Ct. 1517, 1522 (1997) (citing *Pitcairn*, 324 U.S. at 125-126)).

A. The Judgment of the Supreme Judicial Court Rests Entirely On State Law Grounds And Does Not "Break" With Common Law Precedent

The judgment of the Supreme Judicial Court is entirely grounded on Massachusetts common law governing contractual obligations and involves no "break" from that law, sharp or otherwise. The only thing novel about the decision is that which is common to any case involving complex commercial and contractual relationships — the application of settled principles of law to the unique facts and circumstances of the particular controversy and contractual arrangement.

While Petitioner glosses over the important contractual issues considered and decided by the Supreme Judicial Court, Justice Fried's opinion analyzes them carefully and cogently. A review

of that analysis demonstrates clearly that the decision was based entirely on existing Massachusetts law governing contracts.

Two principal points were pressed by the City on appeal. It argued first that the option provision of the Tripartite Agreement was too indefinite and uncertain as to its terms, and that therefore no binding contract existed with respect to the option on the Hayward Parcel. The City also argued that, as a matter of law, there was no breach. A critical part of the analysis in the Supreme Judicial Court's decision was its finding that:

> Although the City treats these as quite distinct arguments, we believe that they must be considered together to come to a fair and sensible view of the arrangement between the parties and their dealings with each other pursuant to it. . . . It would be most unfortunate if parties could not make binding, reliable agreements about such complex projects, allowing them to make commitments and seek financing before their conclusion. If the specificity the City claims is necessary were insisted on, no such agreements could be concluded. *But it is the other side of this same coin that the procedures necessary to lend specificity to what at the outset is not entirely specific are an integral part of the agreement the parties concluded, and, if a party does not follow those procedures, it should not be able to claim that the other side is in breach of what is necessarily still an open-ended arrangement.*

Lafayette Place Associates, 427 Mass. at 516; Appendix at 33-34 (emphasis added).

The Supreme Judicial Court examined both interrelated issues within the context of applicable Massachusetts law governing contracts. The court concluded that notwithstanding the contingencies and uncertainties in the Tripartite Agreement,

> [i]f parties specify formulae and procedures that, although contingent on future events, provide mechanisms to narrow present uncertainties to rights and obligations, their agreement is binding. (cites omitted).

427 Mass. at 518; Appendix at 35. But it was

> only because such mechanisms were specified [in the Tripartite Agreement] that we had been willing to hold that the arrangement between the parties is definite enough to constitute a binding agreement.

427 Mass. at 521; Appendix at 40.

It was in this context that the Supreme Judicial Court attempted to come to a "fair and sensible view of the arrangement between the parties and their dealings with each other pursuant to it." 427 Mass. at 516; Appendix at 33. And it was in this context that the court applied two well-settled principles of Massachusetts contract law. The first principle dictates that when performance under a contract is concurrent, as it clearly was here, one party cannot put the other in default unless he is "ready, able and willing to perform and has manifested this by some offer of performance." *Mayer v. Boston Metropolitan Airport, Inc.*, 355 Mass. 344, 354 (1969) (quoting *Leigh v. Rule*, 331 Mass. 664, 668 (1954)). The other corollary principle is that "any material failure by a plaintiff to put a defendant in breach bars recovery." *Pas-Teur, Inc. v. Energy Sciences, Inc.*, 11 Mass. App. Ct. 967, 968-969 (1981). *See also Kanavos v. Hancock Bank Trust Co.*, 395 Mass. 199, 202-203 (1985) ("the bank's obligation to sell the shares and Kanavos's obligation to pay for them were concurrent obligations. If neither could perform, even if the bank repudiated the contract, neither could recover. 6 S. Williston, *supra* § 882, at 389-391."). In articulating each of these rules, the Supreme Judicial Court cited to and applied established Massachusetts law on contracts.

Upon review of the record evidence, the court found, as a matter of law, that Petitioner had not put the City in breach of the

Tripartite Agreement because neither Petitioner nor the City was "ready, willing, and able to perform." As the Supreme Judicial Court stated:

> LPA's complaint that the city and the BRA breached the contract by failing to determine the exact size and composition of the Hayward Parcel is undermined by LPA's failure to initiate arbitration about the undecided details or even to propose to the city that the procedures specified in the Tripartite Agreement should be used to resolve these differences. Similarly, questions about the treatment of Avenue de Lafayette and the allocation and value of air rights over it and other streets could have been answered in arbitration, but neither LPA nor Campeau ever sought such answers.

427 Mass. at 522; Appendix at 41. Because Petitioner did not resort to the contractual mechanisms that were available to it in order to determine the exact boundaries, market value, and price of the Hayward Parcel, the Supreme Judicial Court determined that Petitioners' offer to purchase the parcel was meaningless. *See id.* at 521-522; Appendix at 40-41.

While Petitioner characterizes the holding of the Supreme Judicial Court as "surprising" and "startling," it was the same result that the City urged on the Supreme Judicial Court, and it was quite unremarkable. To be sure, the City's arguments may not have been made with the concise eloquence of the Supreme Judicial Court's decision as authored by Justice Fried. But the ultimate holding of the Supreme Judicial Court in this case could come straight from the pages of a treatise explicating Massachusetts law of contracts, as follows:

> In this circumstance, where a complex contract leaves certain key terms to be decided by formulae and procedures, and where both parties share responsibility for activating those procedures, the

> plaintiff cannot be ready, willing, and able to tender, nor can the plaintiff put the defendant in default, unless the plaintiff attempts to use the contractually specified mechanisms to overcome the very uncertainties they were designed for. If two parties form an agreement that incorporates procedural devices to overcome unknowns, a plaintiff must at least attempt to make use of those devices before he can claim that the unknowns prevented meeting his obligations at law.

427 Mass. at 523; Appendix at 43.

Contrary to what Petitioner would have this Court believe, numerous Massachusetts cases support the principles relied upon by the Supreme Judicial Court. *See, e.g., Irvin v. Gregory*, 13 Gray, 215, 218 (1859); *Hapgood v. Shaw*, 105 Mass. 276, 279 (1870) (neither party in default where neither offered to perform his part of the agreement); *Cole v. Killam*, 187 Mass. 213, 216 (1905) (plaintiff ready, able and prepared to pay and offered to do so); *Hunt v. Bassett*, 269 Mass. 298, 302 (1929) (recovery denied where plaintiff did not properly exercise option, did not tender purchase price, and did not prove that he offered and demanded performance and was ready, willing and able to carry out his part of the transaction); *Beck v. Doore*, 319 Mass. 707, 710 (1946) (where parties agreed that papers would be passed at bank and plaintiff's attorney went instead to registry of deeds, plaintiff never tested defendant's ability and willingness to perform by tendering performance and demanding conveyance); *Marlowe v. O'Brien*, 321 Mass. 384, 386 (1947) (plaintiff demanded performance where he was ready, able and willing to buy property); *Leigh v. Rule*, 331 Mass. 664, 668 (1954); *Mayer v. Boston Metropolitan Airport, Inc.*, 355 Mass. 344, 354-355 (1969) (no breach where no showing on either side of a "readiness to perform"); *Kanavos v. Hancock Bank & Trust*, 395 Mass. 199, 202-203 (1985) (if neither party could perform neither could recover); *LeBlanc v. Molloy*, 335 Mass. 636, 637-638 (1957) (evidence supported conclusion that plaintiffs were ready, able and willing to perform and had so

informed defendants); *Pas-Teur, Inc. v. Energy Sciences*, Inc., 11 Mass. App. Ct. 967, 968-969 (1981) (plaintiff failed to put defendant in default where no evidence to indicate plaintiff had done what was required of it by the agreement); *Fox of Boylston St. Ltd. Partnership v. Mayor of Boston*, 418 Mass. 816, 819-20 (1994) (notice letter specified closing date and location); *Bucciero v. Drinkwater*, 13 Mass. App. Ct. 551, 552-553 (1982) (buyer was ready, willing and able to perform when he arrived at closing with payment).

Even if the Supreme Judicial Court got it wrong — and it did not — its mistake would have been in how it applied existing Massachusetts law to the record. It is not the business of this Court, nor within its jurisdiction, to sift through factual records and correct such purported mistakes. *See United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant certiorari to review evidence and discuss specific facts.").

With respect to the fact that Petitioner's contract was with the government, the court noted only that, while

> governments are [not] absolved from performing contractual obligations, . . . where a government contract specifies procedures and methods a private party must be particularly assiduous to comply with them. "Men must turn square corners when they deal with the Government." *Rock Island, Ark. & La. R.R. v. United States*, 254 U.S. 141, 143 (1920) (Holmes, J.).

427 Mass. at 523-24; Appendix at 43. This *dicta* was not material to the Supreme Judicial Court's holding and, in any event, says nothing more than that a party to a contract, whether it is a governmental entity or not, must comply with the precise terms of the agreement. Surely, Petitioner cannot argue seriously that this principle is inconsistent with Massachusetts precedent.

Except to Petitioner, which clearly did not expect to lose its multi-million dollar jury verdict, the Supreme Judicial Court's opinion is not at all surprising. The decision is simply another case in the *body* of common law in Massachusetts; it is not a departure from existing common law or a limitation or expansion of the substance of contracting parties' rights under the state's common law. A common law decision that rests entirely upon — and does not break with or overturn — common law precedent or otherwise implicate constitutional concerns does not trigger Supreme Court jurisdiction. Any result to the contrary would represent a severe crack in this country's federal system of government.

B. The Judgment Of The Supreme Judicial Court Does Not Raise Federal Constitutional Issues

Petitioner asks this Court to hold that a civil judgment of a state's highest court, which overturns or "sharply breaks" with prior common law precedent, may violate a party's federal constitutional rights under the Due Process Clause and the Takings Clause of the U.S. Constitution. There is no support for Petitioner's argument. As stated above, the Supreme Judicial Court's judgment in this action did not overrule or sharply break with prior common law precedent in Massachusetts governing parties' obligations under contract. Thus, the premise for Petitioner's constitutional law theories does not exist. Moreover, even if it did the Supreme Court has made clear that a civil judgment of a state court based on common law does *not* by itself implicate federal questions.

Relief from changes — sharp or otherwise — in state common law is exclusively a matter of state law, even where the effect of the purported change may impair the validity of a contract. "There is no constitutional right to have all general propositions of law once adopted remain unchanged." *Patterson v. Colorado*, 205 U.S. 454, 461 (1907). This Court has further held that the federal Constitution has "no voice" regarding a state court overruling a state law. *Great Northern Railway v. Sunburst Oil & Refining*

Co., 287 U.S. 358 (1932). If a federal question is not presented in the action, the Supreme Court may not interject itself into a state court decision overturning state civil law. *See also Patterson, supra* at 461 ("Even if it be true, as the plaintiff in error says, that the supreme court of Colorado departed from earlier and well-established precedents to meet the exigencies of this case, whatever might be thought of the justice or wisdom of such a step, the Constitution of the United States is not infringed.").

In *Tidal Oil Co. v. Flanagan*, 263 U.S. 444, 455-456 (1924), the Court held that

> [t]he mere reversal by a state court of its previous decision, as in this case before us, whatever its effect upon contracts, does not, as we have seen, violate any clause of the federal Constitution. Plaintiff's claim, therefore, does not raise a substantial federal question. This has been decided in so many cases that it becomes our duty to dismiss the writ of error for want of jurisdiction.

The Court stated specifically, that a state court's reversal of an earlier decision "to the prejudice of one party *does not take away his property without due process of law*." *Id.* at 450 (emphasis added).

Following *Tidal Oil,* the Court in *Fleming v. Fleming*, 264 U.S. 29, 31 (1924), held that "judicial impairment of a contract obligation" does not present a "federal question of which this court could take jurisdiction on a writ of error from a state court." The *Fleming* Court further rejected the argument, which Petitioner makes here, that the state court's decision could have been "legislative" in nature. *Id.* at 31-32.

Echoing these principles as to overrulings of state common law decisions, even when those decisions are applied "retroactively," Justice Cardozo stated in *Great Northern Railway v. Sunburst*:

> [w]e think the federal constitution has no voice upon the subject. A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward. . . . The alternative is the same whether the subject of the new decision is common law . . . or statute. . . . The choice for any state may be determined by the juristic philosophy of the judges of her courts, their conceptions of law, its origin and nature.

287 U.S. at 364-65 (internal citations omitted).

Similarly, in *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673 (1930), Justice Brandeis stated that judicial changes in the common law do not implicate rights under the U.S. Constitution:

> the process of trial and error, of change of decision in order to conform with changing ideas and conditions, is traditional with courts administering the common law. Since it is for the state courts to interpret and declare the law of the State, it is for them to correct their errors and declare what the law has been as well as what it is. State courts, like this Court, may ordinarily overrule their own decisions without offending constitutional guaranties, even though parties may have acted to their prejudice on the faith of earlier decisions.

Id. at 681 n.8.

The Court's statements cited above are consistent with the principle that a state's highest court is the final arbiter of state law within its jurisdiction. *See Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590 (1875); *Herb v. Pitcairn*, 324 U.S. 117, 125-126

(1945) ("This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds.").[8]

From a practical standpoint, a Pandora's box would be opened if the Court were to impose federal constitutional review on state court decisions that may constitute a "sharp" break with precedent. The number of petitions for a writ of certiorari could escalate sharply. Moreover, the evaluation of state court decisions to determine if they represent "sharp" enough breaks to trigger constitutional protections would cause an unwarranted invasion into the well-established boundaries between federal and state law that have existed for more than two hundred years.

As Petitioner acknowledges,

> [t]he essence of the common law is its evolution over changing circumstances and times. This Court has been reluctant to place constitutional limitations on this important attribute of the common law tradition.

Petition at 9-10. To the extent that the Supreme Judicial Court's judgment represents *any* change in state common law (which it

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8. Petitioner's tenuous reliance on Justice Stewart's concurrence in *Hughes v. Washington*, 389 U.S. 290 (1967) is unavailing. First, as discussed above, the Supreme Court has refused on repeated occasions to find that unexpected state law decisions may trigger constitutional limitations. "This Court is forever adding new stories to the temples of constitutional law, and the temples have a way of collapsing when one story too many is added." *Douglas v. City of Jeannette*, 319 U.S. 157, 181 (1943) (Jackson, J., concurring). Second, even Justice Stewart recognized in *Hughes* that if a state court decision "arguably conforms to reasonable expectations," the Court must accept it as conclusive of prior state law. 389 U.S. at 296. As the City has argued above, the Supreme Judicial Court's opinion did not "break" with precedent or upset "reasonable expectations."

does not), that change is nothing more than a gradual evolution of a living body of law.[9]

C. Petitioner's Takings and Due Process Arguments Have No Basis

Even if the Court were to consider applying constitutional limitations to state common law judgments, the takings and due process arguments urged upon the Court by Petitioner lack merit. The Supreme Judicial Court did not "take" property belonging to Petitioner and give it to the City; but for a legally erroneous jury verdict, Petitioner never had property rights in the Hayward Parcel. Under these circumstances, neither the Takings Clause nor Due Process Clause of the U.S. Constitution can be implicated.

1. *The Supreme Judicial Court did not "take" Petitioner's property*

Petitioner asserts that a state court's "sharp break" with civil common law can result in a taking. Specifically, Petitioner asserts that the Supreme Judicial Court's decision to reverse the jury verdict against the City — because it was a "surprise" to Petitioner — effectively took Petitioner's property rights in the Tripartite Agreement. In addition to the reasons stated above, Petitioner's argument must fail because the Supreme Judicial Court did not "take" any property rights belonging to Petitioner.

Specifically, Petitioner argues that

> [a]bsent the retroactive application of these new common law doctrines, LPA would have retained

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9. Applying a takings analysis to a judicial decision based on the common law is inconsistent with the fundamental principle that the common law is a fluid and ever-changing body of law. Indeed, despite numerous opportunities to do so, the Supreme Court has never held that a state judicial change in state common law can result in a violation of the Takings Clause of the U.S. Constitution.

> its $9.6 million judgment because the Campeau letter met the "some offer of performance" rule in *Leigh v. Rule*.

Petition at 16. Petitioner's remarkable argument, however, is based on its overly limited reading of the Supreme Judicial Court's opinion described above. Under Massachusetts law, Petitioner's purported offer of performance in the Campeau letter was insufficient because, at the time it was made, neither Petitioner nor the City was "ready, willing, or able" to perform. Petitioner had not made efforts to resolve open issues that had to be settled — under the specific mechanisms set forth in the Tripartite Agreement — in order for the sale of the Hayward Parcel to take place.

No "surprise" decision of the Supreme Judicial Court in this case rendered Petitioner's offer of performance invalid. As a matter of law, that offer was invalid when it was made. Thus, Petitioner never had property rights in the Hayward Parcel, and there was never any basis for its multi-million dollar award against the City. The Supreme Judicial Court's decision, rather than take property that rightfully belonged to Petitioner, did nothing more than correct a legally erroneous jury verdict.

The essence of Petitioner's argument is that if the court had not reversed the jury verdict it still would have a multi-million dollar award against the City. In other words, Petitioner suggests that, prior to final review of the jury's verdict, it had a *vested* property right in that verdict. According to Petitioner, that the court reversed the jury verdict means the court "took" what belonged to Petitioner for the benefit of the City.[10] This strident argument, if accepted, would mean that any state court's reversal

10. The Supreme Judicial Court, of course, has the power to reverse a jury verdict where it is against the weight of the evidence. *See Forlano v. Hughes*, 393 Mass. 502, 504 (1984); *New England Acceptance Corp. v. American Mfrs. Mut. Ins. Co.*, 373 Mass. 594, 596 (1977); *Rubel v. Hayden, Harding & Buchanan, Inc.*, 15 Mass. App. Ct. 252, 254 (1983).

of a jury verdict based on state common law would trigger federal constitutional protection. This is not a result expected or intended by the U.S. Constitution or the precedent of this Court. No taking, within the meaning of the federal Takings Clause, could have occurred here.[11]

2. *There are no due process issues presented by this case*

As noted above, federal substantive due process principles generally do not apply to state civil judgments. This Court has stated in *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 680 (1930) that

> the mere fact that a state court has rendered an erroneous decision on a question of state law, or has overruled principles or doctrines established by previous decisions on which a party relied, does not give rise to a claim under the Fourteenth Amendment or otherwise confer appellate jurisdiction on this Court.[12]

Similarly, in *American Ry. Express Co. v. Kentucky*, 273 U.S. 269, 273 (1927), the Court noted that

> [i]t is firmly established that a merely erroneous decision by a state court in the regular course of judicial proceedings does not deprive the unsuccessful party of property without due process of law.

See also Tidal Oil Co. v. Flanagan, *supra*, 263 U.S. at 450.

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11. In the interest of brevity, the City does not respond to the remainder of Petitioner's takings argument, which the City believes is without merit. If the Court wishes further briefing on this issue, the City will be pleased to provide it.

12. In *Brinkerhoff-Faris*, the Supreme Court reversed a decision of the Missouri Supreme Court on the ground that the judgment denied appellant due-process in the "primary" (i.e., procedural) sense. 281 U.S. at 681.

In its desperation to construct a constitutional issue, in the end Petitioner can do nothing more than rely on argument by adjective. Petitioner describes the Supreme Judicial Court's judgment as "arbitrary," "capricious," "self-interested," "unfounded," unjustified, and "unprincipled." As discussed above, however, the Supreme Judicial Court's decision was none of these things. The stark reality is that Petitioner did not expect to lose its multi-million jury verdict; that it did so does not provide a basis for impugning the integrity of Massachusetts' highest court.

CONCLUSION

For all of the foregoing reasons, Respondent the City of Boston respectfully requests that the Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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